UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, *et al.*, Plaintiffs, v. ANDREW WHEELER, Acting Administrator, United States Environmental Protection Agency, *et al.*, Defendants, and HOULTON BAND OF MALISEET INDIANS, and PENOBSCOT NATION, Intervenors-Defendants.	)	Civil Action No. 1:14-cv-264-JDL

MAINE'S LIMITED OPPOSITION TO EPA'S MOTION FOR VOLUNTARY REMAND

Plaintiffs (Maine) hereby oppose, in part, the motion of Defendants (EPA) for a voluntary remand. ECF 139.[1] EPA has informed the Court that it "has decided to change, and not defend" the decisions Maine challenges in this case, *id.* ¶¶ 3, 7, and that it will "materially revise" those decisions, *id.* ¶ 5. Against this background, Maine agrees that a remand is appropriate. EPA also requests that the Court order remand without vacatur. *Id.* ¶ 7. As explained in more detail below, Maine opposes remand without vacatur, particularly with respect to the EPA interpretations and decisions creating a new designated use of tribal sustenance fishing, because it would allow the challenged decisions, which EPA has now disavowed, to remain in effect indefinitely causing ongoing regulatory disruption and harm to Maine. The Court should instead vacate the

[1] That portion of EPA's motion seeking a stay of the proceedings pending the Court's decision on EPA's motion for voluntary remand was resolved by the Court's August 2, 2018, Scheduling Order. ECF 148.

challenged decisions in its remand order, thereby restoring the status quo as it existed prior to EPA's 2015 actions with respect to Maine's designated uses of its waters while the agency undertakes reconsideration.

DISCUSSION

It is well established that an agency may request a voluntary remand for the purpose of reconsidering a decision that is challenged on appeal. *Limnia, Inc., v. U.S. Dep't of Energy*, 857 F.3d 379, 386-88 (D.C. Cir. 2017); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). In deciding a motion to remand, courts consider whether remand would unduly prejudice the non-moving party. *Util. Solid Waste Activities Grp. v. EPA*, No. 15-1219, --- F.3d ---, 2018 WL 4000476, *15 (D.C. Cir. Aug. 21, 2018). Such remand requests may be due to "intervening events outside of the agency's control," *SKF USA*, 254 F.3d at 1028, or simply to reconsider the agency's previous position, with or without confessing error, *id.* at 1029. While courts have broad discretion as to whether to grant voluntary remand requests, *Limnia, Inc.*, 857 F.3d at 386-88, courts generally grant such requests unless they are found to be frivolous or made in bad faith. *SKF USA*, 254 F.3d at 1029; *Cal. Communities against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). The Court should grant EPA's request for a remand in this case because the agency has provided valid reasons to support it and there is no evidence of bad faith. *See* ECF 139 ¶ 4 (EPA motion explaining that remand is appropriate to allow agency to modify decision in light of new Department of Interior ("DOI") opinion letter, ECF 129-1, addressing tribal sustenance fishing in Maine). Further, remand here will conserve judicial resources because EPA's reconsideration is likely to resolve or render moot at least some issues that are now before the Court for adjudication.

Voluntary remand requests present the additional question of whether the challenged decision should remain in effect while the agency undertakes reconsideration of the matter. There is a split among district courts as to whether a court may vacate an agency decision without first issuing a ruling on the merits. *Water Legacy v. U.S. EPA*, 300 F.R.D. 332, 345 (D. Minn. 2014) (recognizing the split without choosing sides). Some courts have held that it is within the court's equity jurisdiction to vacate agency action without making a decision on the merits. *See All. for Wild Rockies v. Marten*, No. CV 17-21-M-DLC, 2018 WL 2943251, at *2 (D. Mont. June 12, 2018) (using the same standard for whether to vacate that is used after a court rules on the merits); *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016); *N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 1:16-CV-00307-LJO-MJS, 2016 WL 8673038, at *6 (E.D. Cal. Dec. 16, 2016); *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011). Other courts have reached the contrary conclusion, holding that the court may not vacate the decision without an affirmative finding that the agency erred. *Frito-Lay, Inc. v. U.S. Dep't of Labor*, 20 F. Supp. 3d 548, 557 (N.D. Tex. 2014); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 136 (D.D.C. 2010); *see also Friends of Park v. Nat'l Park Serv.*, No. 2:13-CV-03453-DCN, 2014 WL 6969680, at *4 (D.S.C. Dec. 9, 2014) (suggesting, without holding, the same). The First Circuit has yet to address the question.

In this case, the Court should vacate the challenged decisions while granting EPA's request for voluntary remand, particularly with respect to the EPA decisions creating a new designated use of sustenance fishing for all Maine tribes and tribal waters through new EPA interpretations of longstanding Maine law. Courts that have exercised their equitable powers to vacate agency decisions without first ruling on the merits have done so based on consideration of the apparent problems with the challenged decision, weighed against any harm, including any

disruptive consequences, that would flow from vacatur. *All. for Wild Rockies*, 2018 WL 2943251, at *3; *Ctr. for Native Ecosystems*, 795 F. Supp. 2d at 1240–42. Here, the Court need not delve deep into the merits in order to appreciate that serious problems exist with the challenged decisions. For example, EPA has informed the Court that one of the reasons it needs to change its decision is that DOI has changed its position from that expressed in a January 30, 2015 letter that EPA relied upon in its decisions. ECF 139 ¶ 4. As the Penobscot Nation explains in its Motion to File Counterclaim, ECF 141 at 5-6, DOI's original opinion letter was a fundamental underpinning of EPA's decision. Maine's brief argues that EPA's reliance on DOI's flawed reasoning caused legal error. ECF 118 at 47, 58. EPA must now change its decisions to account for the correction in DOI's position, and those decisions should not be allowed to remain in effect now that it is clear they were based on a discredited opinion.

Vacatur of the challenged decisions would also not cause any harm to the tribal intervenors or the environment, and would avoid, rather than create, disruptive consequences. Because Maine did not accept but instead challenged the 2015 EPA decisions at issue here, EPA separately proposed and promulgated its "Maine Rule."[2] Maine has always anticipated an eventual challenge to EPA's Maine Rule if it prevailed in this litigation because the Maine Rule is based on and assumes the lawful existence of the new sustenance fishing designated use, which EPA created through its new interpretations in the challenged decisions. Maine still intends to eventually challenge or request that EPA amend the Maine Rule on similar grounds if EPA does not itself change the Maine Rule following the actions it intends to take on remand. In the meantime, however, the Maine Rule remains in effect and establishes federal water quality

[2] *See* 33 U.S.C. § 1313(c)(3)-(4); 40 C.F.R. § 131.22; *see also* Proposal of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 23239, 23241-42 (proposed Apr. 20, 2016); Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466, 92467-68 & 92478-79 (Dec. 19, 2016).

criteria for all tribal waters addressed by the challenged decisions.[3] Those federal criteria purport to protect all designated uses – including EPA's new sustenance fishing designated use created by its 2015 interpretations and decisions that EPA is no longer defending and intends to change on remand, ECF 139 ¶ 3. Because the Maine Rule and its federal criteria are for now still in effect, they redress any harm that could result from vacatur of the challenged decisions.

On the other hand, leaving the challenged decisions intact without vacatur while EPA reconsiders and materially changes them would create disruptive consequences and harm to Maine. Under the Clean Water Act, Maine expressly retains the primary right and responsibility to plan the development and use of its land and water resources. 33 U.S.C. § 1251(b). Maine's water program, 38 M.R.S. §§ 464-470, classifies all Maine waters and sets forth with specificity the State's chosen designated uses for each of its classifications. These Maine classifications and designated uses more broadly "direct the State's management" of its waters. 38 M.R.S. § 464(1); *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980) (even more so than water quality criteria, designation of uses of waters is "closely tied to the zoning power Congress wanted left with the states"). By injecting a new EPA-created designated use of sustenance fishing for tribal waters into the mix, the challenged decisions create new tribal and non-tribal sub-classes of Maine waters that Maine itself never created and believes are unlawful. Leaving those challenged decisions intact while EPA commits to changing them and the underlying interpretations creating the sustenance fishing designated use will disrupt Maine's management of its waters in other important regulatory contexts that involve evaluation of Maine's designated uses for purposes other than establishing water quality criteria.[4]

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[3] *See* 81 Fed. Reg. at 92469-72.

[4] Designated uses are themselves a narrative form of water quality standards, *see* 40 C.F.R. 131.3(i), and are considered in other important regulatory contexts beyond water quality criteria, such as certifications

Leaving the challenged decisions in effect even though EPA has declined to defend them and announced that they will be changed will also lead to confusion and potential litigation over which water quality standards and designating uses are in effect during the remand. It makes no sense for state and federal regulators to be enforcing compliance with standards and designated uses they know to be based on a flawed decision and subject to change.[5] Likewise, it would be inequitable to require members of the regulated community to order their lives around legally suspect standards and designated uses that are bound to change. Vacatur would restore the status quo as it existed before the issuance of the challenged decisions in 2015, but with safeguards in place for affected tribal waters as a result of the federal criteria in EPA's Maine Rule. Vacatur is the only way to provide clarity and regulatory certainty during the remand without giving enduring legal effect to the flawed decisions that EPA has disowned and vowed to correct.

The totality of the circumstances here warrant remand with vacatur. EPA no longer stands by the decisions that are challenged on appeal, has informed the Court it will not defend those decisions, and has formally committed to changing those decisions. It is apparent from the record that serious problems exist with the decisions, and vacatur pending agency action on remand will not cause disruptive consequences, but rather avoid them. Maine should not be

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under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, which are generally required in connection with federal permitting for activities that may result in a discharge to navigable waters. *See PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 714-17 (1994) (in the context of a Section 401 certification, requiring compliance with both narrative designated uses and water quality criteria); *Watts v. Bd. of Envtl. Prot.*, 2014 ME 91, ¶ 13, 97 A.3d 115 (affirming agency's balancing of designated uses for purposes of issuing a Section 401 certification for a federal hydroelectric license); *Bangor Hydro-Elec. Co. v. Bd. of Envtl. Prot.*, 595 A.2d 438, 442-43 (Me. 1991) (proper for agency to consider goals of designated uses in reviewing hydroelectric license). Maine should not have to consider or balance EPA's new tribal sustenance fishing designated use in Section 401 and other regulatory contexts while EPA changes its interpretations and decisions creating that designated use.

[5] EPA and Maine DEP cannot adequately solve this problem by exercising their enforcement discretion. The Clean Water Act's citizen suit provision authorizes third party enforcement actions. 33 U.S.C § 1365. The only way to be sure no one is subjected to an enforcement action for failing to comply with standards that EPA no longer stands by is for the Court to vacate the challenged decisions in its remand order.

forced to live indefinitely with the effects of the flawed decisions it has challenged in this case while EPA undertakes the reconsideration process to correct its mistakes.

Should the Court decline to remand with vacatur, then Maine alternatively requests that the Court retain jurisdiction, hold this case in abeyance, and establish a reasonable timeframe for EPA's reconsideration of the challenged decisions. *See Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) (recognizing a limitation on agency authority to reconsider to within a reasonable time); *Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C.Cir. 1962) (noting that "when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency"), *cert. denied,* 370 U.S. 922 (1962); *XP Vehicles, Inc. v. United States Dep't of Energy*, 156 F. Supp. 3d 185, 193 (D.D.C. 2016) (district courts have the authority to stay court proceedings and retain jurisdiction over cases even when an agency's request for a voluntary remand is granted; while this is not always done, courts have exercised their discretion to do so when, for example, the court wishes to ensure that a voluntary remand will not, in fact, prejudice the non-movant, or when the interest in an expeditious and compact resolution of matter is particular weighty), *rev'd on other grounds*, *Limnia*, 857 F.3d 379; *Greater Yellowstone Coal. v. U.S. E.P.A.*, No. 4:12–CV–60–BLW, 2013 WL 1760286, at *5 (D. Idaho Apr. 24, 2013) (granting motion for voluntary remand allowing 90 days for a new EPA action, and retaining jurisdiction to "ensure a timely remand process and to allow the parties to challenge any new [agency] decision in this case."). Given that the parties are in the late stages of this litigation and have had ample opportunity to already fully evaluate the issues, Maine believes that four months (120 days) constitutes a reasonable timeframe for EPA's reconsideration and action on remand here.

Dated: September 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2018, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification and a copy of such filing(s) to all counsel of record who have consented to electronic service. To my knowledge, there are no other non-registered parties or attorneys participating in this case.

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